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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

CLEMENT GREGG ONSTOT,

Defendant and Appellant.

C047603

(Super. Ct. No. CM018565)

Defendant Clement Gregg Onstot entered a negotiated plea of no contest to two counts of committing a lewd act on a child under age 14. (Pen. Code, § 288, subd. (a).) The trial court denied probation and sentenced defendant to state prison for an aggregate term of eight years, consisting of the six-year midterm as the principal term and a consecutive two-year term.

On appeal, defendant claims the trial court abused its discretion by denying probation and imposing the six-year midterm and thereby violated his right to due process. We conclude that defendant has not demonstrated any prejudicial

error. We shall order the trial court to correct a minor error in the abstract of judgment and affirm in all other respects.

FACTS

A. Underlying Facts

Defendant's wife contacted an investigator at the district attorney's office in April of 2002, to report that defendant had sexually molested her 24-year-old daughter (his stepdaughter) when she was a young girl. Defendant's wife said she had confronted defendant about the allegations, and he had admitted molesting the girl. Defendant's wife had separated from defendant after becoming aware of what he had done.

The victim reported that defendant sexually molested her on multiple occasions when she was between the ages of seven or eight years old and 11 or 12 years old. The probation report contains the following, general summary of the abuse: "The victim said although she does not remember every incident with particularity, there were between 15 and 30 incidents wherein the defendant sexually molested her in some way. The incidents typically began the same way, with the defendant coming into her bedroom and rubbing her body when she was asleep. The defendant touched her breasts and vagina with his hand on every occasion. The victim estimated the defendant touched her with his penis on ten of those occasions. He masturbated and ejaculated on her stomach on five of those occasions. The victim said the defendant had her masturbate his penis once. The defendant orally copulated her and attempted to have her orally copulate him on one occasion. The victim also said the defendant

apologized to her after almost every incident." The victim also gave more detailed descriptions of some incidents, including one in which defendant slightly inserted his penis into her vagina.

The victim was emotionally affected by the abuse and did not disclose it to anyone until she was an adult. She felt helpless and indicated she did not think she would live to be 21 years old. Even as an adult, she indicated she had a difficult time trusting men and expressed a great deal of anger because of what had happened. Defendant admitted some inappropriate touching and conduct with the victim but disputed the extent of abuse the victim had described.

According to defendant's wife, he had previously admitted that when he was 21 years old, he had sexual relations with a 14-year-old girl and a 16-year-old girl. Another witness also indicated defendant admitted this conduct. But defendant claimed the two girls he had mentioned had actually been 16 and 18 years old.

B. Plea and Subsequent Proceedings

Defendant was charged with continuous sexual abuse of a child under the age of 14, committed between May 7, 1987, and May 7, 1992. He pleaded no contest to two counts of committing lewd acts between the same dates, and the continuous sexual abuse charge was dismissed with a *Harvey* waiver. (See *People v. Harvey* (1979) 25 Cal.3d 754.)

Before sentencing, the trial court ordered a mental evaluation of defendant pursuant to Penal Code section 288.1 and a diagnostic evaluation pursuant to Penal Code section 1203.03.

Psychological evaluations of defendant were generally favorable, and the staff psychologist who evaluated him as part of the diagnostic evaluation supported a grant of probation. However, the associate warden who submitted the diagnostic evaluation concluded: "It is the opinion of the majority of the diagnostic staff that the defendant needs to be held accountable. If he were granted probation and again failed, he would present a significant risk to the public. It is recommended that the defendant be incarcerated within the Department of Corrections." The defense filed a statement in mitigation arguing for a grant of probation.

C. Sentencing

The trial court made some precatory remarks before articulating its sentencing decisions. The court then explained that it would deny probation and impose the midterm as the principal term: "The Court has reviewed the criteria affecting probation that are contained in Rule of Court 4.414. And because of the charges to which he pled there's no statutory prohibition of the Court granting probation. But I'm not going to grant probation.

"I'm going to deny probation based upon the following criteria. The nature, seriousness and circumstances of the crime. The victim was vulnerable. And every victim is vulnerable. Some 288's don't occur in a family context. They occur say at a beach or they're crimes of opportunity where someone sees a stranger and fondles the child or does something without there being any relationship between them.

"When I say vulnerable, they're in the same home, they're in contact whether they want to be or not. And likewise he took advantage of a position of trust. He did inflict if not physical injury, emotional injury.

"The family has asked that I impose the maximum. Well, the maximum if I ran these -- if I gave him the upper term consecutive would be by my arithmetic ten years.

"Mr. -- whether and I understand the emotions of a family involved in something like this. The Court has seen the entire record through all the various materials supplied by Probation, the defense and everyone else, and I feel the appropriate term in light of everything for the principal term would be the mid term.

"So the crime of Penal Code 288(a) contained in Count 2, is designated the principal term. The crime of Penal Code 288(a) as is contained in Count 3 is designated the subordinate term.

"As to the principal term, the Court will impose the mid term finding that to be the appropriate term because the [sic] totality of the circumstances in aggravation. There certainly are. There are circumstances also that the law recognizes as mitigating whether the people involved do or not. And I have to consider those. And I find that the circumstances in aggravation which do exist and the circumstances in mitigation which do exist do not outweigh one another."

DISCUSSION

Although the argument heading in defendant's opening brief refers only to the trial court's decision to deny probation, in

the subsequent discussion defendant also raises a fallback argument challenging imposition of the midterm. The People address this argument as a separate claim. We shall also address each of the issues, but we admonish defendant's counsel to ensure in the future that his argument headings fully describe the issues.

I. Denial of Probation

Review of the trial court's decision to deny probation is governed by the deferential abuse of discretion standard. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1586.) "Our function is to determine whether the . . . court's order is arbitrary or capricious, or "exceeds the bounds of reason, all of the circumstances being considered.'" [Citation.] The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." (*People v. Superior Court (Du)*, *supra*, at p. 831.)

In both the trial court and on appellate review, defendant claims that consideration of the relevant factors, including the general objectives of sentencing, indicates probation is warranted. He argues that the trial court focused on punishing him and overlooked or did not fully appreciate other considerations, such as protecting society, deterrence,

preventing future crimes through incarceration, and encouraging defendant to lead a law-abiding life. (See Cal. Rules of Court, rule 4.410(1), (3), (4) & (5).) Defendant explains: "While the judge did say he had 'reviewed the criteria affecting probation that are contained in Rule of Court 4.414,' his judgment cannot reasonably be construed to reflect that he seriously considered the above mentioned sections of rule 4.410."

Defendant has not demonstrated any error. The trial court's identification of factors in support of its decision does not mean it failed to take into account other relevant factors. And the California rule of court that enumerates the general objectives of sentencing provides: "Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case." (Cal. Rules of Court, rule 4.410(b).)

We must uphold the trial court's sentencing determinations that are supported by substantial evidence. (See *People v. Downey* (2000) 82 Cal.App.4th 899, 917.) And here, the court's determination that probation was not appropriate is supported by the record. The court referred to: (1) the nature, seriousness, and circumstances of the crime; (2) the victim's vulnerability; (3) the fact that defendant had taken advantage

of a position of trust; and (4) the victim's emotional injury. (See Cal. Rules of Court, rule 4.414(a)(1), (3), (4), (9).)

Defendant also suggests that the trial court improperly cited *both* victim vulnerability and abuse of trust, claiming these factors are based on the same facts. (See *People v. Fernandez* (1990) 226 Cal.App.3d 669, 680 ["Abuse of the parental relationship, however, represents only one aggravating factor, not two"].) But he has not shown he objected on this basis in the trial court. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.) Moreover, we are not convinced the court considered these factors in a cumulative manner since, after explaining why the victim was vulnerable, the court only briefly remarked that defendant "likewise" had taken advantage of a position of trust. Finally, there was evidence suggesting much of the abuse occurred when he approached the victim at night while she was asleep. If the court had considered this fact, it might reasonably have found both aggravating factors.

That is not to say there are not some encouraging and mitigating factors with respect to defendant, including the favorable psychological evaluations and his lack of a criminal record.¹ But the circumstances of this case are such, involving his repeated sexual abuse of his young stepdaughter over a long

¹ Defendant suggests that some correctional employees who were involved in the diagnostic evaluation did not have sufficient credentials or factual basis to render meaningful guidance. But defendant does not identify anything from the record suggesting the trial court improperly credited a particular opinion at the expense of another.

period of time, that there is no reason to conclude the trial court abused its discretion in denying probation.

II. Imposition of Midterm

Like the decision to deny probation, appellate review of the prison term is highly deferential. The trial court has broad discretion to weigh any aggravating and mitigating factors and to select the appropriate sentence. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) Moreover, the midterm is the presumed sentence, and no explanation of reasons is even required for imposing it. (See Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(e).) The midterm is appropriate if neither the aggravating nor the mitigating factors outweighs the other. (See Cal. Rules of Court, rule 4.420(a), (b).)

Defendant argues that "the preponderance of factors in mitigation over those in aggravation must necessarily result in [defendant] receiving the lower term of three years for the base term, rather than the mid term of six years imprisonment." We disagree. The trial court reasonably concluded that the aggravating and mitigating factors were offsetting. And though defendant challenges some aggravating factors cited in the probation report and the diagnostic evaluation, the trial court did not explain what factors it found persuasive and there is no reason to believe from what it did say that it relied on any erroneous factors.

With respect to the latter point, defendant concedes there are "two factors in aggravation which could properly be considered by the court, i.e., that the victim was vulnerable,

and that a degree of emotional trauma to the victim was involved." However, he further claims: "In each of these cases, these factors are inherent in the nature of any 288(a) offense." Aggravating factors are factors that make a crime distinctively worse than the ordinary. (See *People v. Moreno* (1982) 128 Cal.App.3d 103, 110; accord *People v. Fernandez, supra*, 226 Cal.App.3d 669, 680.) But any facts that are more egregious than the average offense may properly support an aggravating factor or factors. (Cf. *People v. Miranda* (1987) 196 Cal.App.3d 1000, 1003.) And though the trial court indicated there were also mitigating factors, the court had already identified why this case was distinctively worse than an ordinary case involving lewd conduct. Under these circumstances, we cannot say the court abused its discretion when it imposed the presumptive, midterm sentence.

III. Clerical Error

Our review of the record reveals a minor error in the abstract of judgment. Defendant's middle name is spelled "Greg," although it is "Gregg." The abstract should be amended accordingly.

DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect that defendant's middle name is spelled "Gregg." The court is further directed to send a certified copy

of the corrected abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

SIMS, Acting P.J.

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.